

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Courtney Bernard Clark, Plaintiff, v. Commissioner Tom Roy, Nannette Larson, Dr. Schmolt properly known as Dr. Derek J. Schmidt, Centurion of Minnesota, Dr. Stephen Craane, Kathy Reid, David Reishus, and Katherine Powers, Defendants.	Case No. 15-cv-2778 (SRN/HB) ORDER ON REPORT AND RECOMMENDATION
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Courtney Bernard Clark, 177753, MCF – Moose Lake, 1000 Lake Shore Dr., Moose Lake, MN 55767, pro se.

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SUSAN RICHARD NELSON, United States District Judge

This matter is before the Court on Plaintiff Courtney Bernard Clark’s (“Clark”) self-titled Objection to This Court [sic] Recommendation to Dismiss Complaint Against Dr. Derek Schmidt (“Objs.”) [Doc. No. 208]. Clark objects to the Report and Recommendation (“R&R”) of Magistrate Judge Hildy Bowbeer (“Judge Bowbeer”) dated

August 22, 2016 [Doc. No. 194]. The R&R recommended dismissing Clark's claims against Defendant Dr. Schmolt ("Dr. Schmolt") without prejudice. (R&R at 4.) As described below, recent case developments make the R&R moot. Thus, the Court respectfully declines to adopt the R&R.

I. BACKGROUND

On June 23, 2015, Clark brought claims under 42 U.S.C. § 1983 alleging that Defendants violated his civil rights by failing to provide him with proper medical care while incarcerated. (See generally Compl. [Doc. No. 1].) In relevant part, Clark listed Dr. Schmolt as a defendant. (See id. at 1.) Clark was given permission to proceed without paying fees and costs (also known as "IFP status"). (See Order dated 11/10/2015 [Doc. No. 20].) The United States Marshals Service (the "USMS") serves summonses and complaints for parties awarded IFP status. (R&R at 1.) However, IFP parties are required to complete USM-285 forms that provide the complete and correct address for each party to be served. (Id.) The IFP party bears the responsibility for providing proper addresses for service. Lee v. Armontrout, 991 F.2d 487, 489 (8th Cir. 1993).

On his first USM-285, Clark listed Dr. Schmolt as the person he intended to serve, but provided no address. (See USM-285 ("First USM-285") at 2 [Doc. No. 24].) Instead, Clark stated that Dr. Schmolt was an "ear, nose, and throat Doctor" who was employed by "Health partner" but who was also a "consultant for Minnesota D.O.C." (Id.) With this scant information, the USMS returned the summons unexecuted (meaning that service was not effectuated) and noted that because Dr. Schmolt was not a Minnesota Department of Corrections ("MNDOC") employee, MNDOC could not accept service.

(Id.)

On May 18, 2016, Judge Bowbeer ordered that Clark complete a USM-285 for Dr. Schmolt by June 16, 2016 and warned Clark that failure to do so would result in a recommendation that the claims against Dr. Schmolt be dismissed. (Order dated 5/18/2016 [Doc. No. 72].) Days later, Clark filed a self-titled Amended Definite Statement in which he again listed Dr. Schmolt as a Defendant. (See Am. Definite Statement [Doc. No. 77].) However, shortly thereafter, Clark requested that prison officials provide him with the contact information for “Dr. Schmidt,” who Clark described as an “ear, nose, throat [sic] doctor at Health Partners” (See Inmate Request dated 5/24/2016 (“Clark’s Request”) [Doc. No. 209].) Prison officials gave Clark the name and contact information of Dr. Derek Schmidt (“Dr. Schmidt”) in response to this request. (Id.) As far as the Court can discern, this is the first time Clark ever suggested that Dr. Schmidt—not Dr. Schmolt—was the individual he intended to sue.¹ However, since Clark’s Request was not filed with the Court until after the R&R was issued, there was no way for Judge Bowbeer to know of this development.

Clark, without indicating that he was now looking to serve Dr. Schmidt and not Dr. Schmolt, requested more time to locate and serve the unserved Defendants. (See Mot. for More Time [Doc. No. 109].) Judge Bowbeer granted Clark’s request, giving him until August 11, 2016 to serve Dr. Schmolt. (Order dated 6/20/2016 [Doc. No. 122].) On June 12, 2016 Clark filed a second USM-285 which listed “Dr. Schmidt Derek

¹ The Court has no way of knowing whether Dr. Schmolt is a real person and whether that individual has any relation to this matter. Until and unless Clark indicates otherwise, the Court assumes Clark means to sue Dr. Schmidt and not Dr. Schmolt.

M.D.” as the defendant and gave an address for “Health Partners.” (See USM-285 (“Second USM-285”) at 2 [Doc. No. 230].) That form indicates that Dr. Schmidt was served with the summons and complaint by certified mail on August 1, 2016. (Id.) Tellingly, the USMS noted the apparent confusion between Drs. Schmolt and Schmidt. (Id.) However, again, this executed USM-285 was not filed with the Court until after the R&R was issued. (See id. (filed with the Court on 9/14/2016).)

On August 22, 2016, Judge Bowbeer issued the R&R, recommending that Clark’s claims against Dr. Schmolt be dismissed without prejudice for failure to prosecute under Federal Rule of Civil Procedure 41(b), or alternatively under Federal Rule of Civil Procedure 4(m). (R&R at 4.) Clark objected and for the first time notified the Court, albeit indirectly, that his claims were really against Dr. Schmidt. (See Objs.) Clark attached the request he filed with prison officials for contact information for Dr. Schmidt to his Objections. (See Clark’s Request.) Days after Clark filed his Objections, Dr. Schmidt filed an answer to Clark’s complaint. (See Ans. of Derek J. Schmidt, M.D. to Pl.’s Compl. [Doc. No. 227] (filed on 9/12/2016).) In that answer, Dr. Schmidt states his belief that he is the “Dr. Schmolt” Clark refers to when discussing the “ear, nose, throat” doctor who treated him. (See id. at 1.) Counsel for Dr. Schmidt then wrote Judge Bowbeer, informing her that he acknowledged receipt of the summons and complaint just prior to her issuing the R&R. (See Ltr. dated 9/19/2016 [Doc. No. 232].)

II. DISCUSSION

The Court must conduct a *de novo* review of any portion of the R&R to which specific objections are made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); D. Minn.

L.R. 72.2(b). Here, Judge Bowbeer correctly concluded that Clark's repeated failures to properly serve Dr. Schmolt warranted dismissal without prejudice pursuant to Federal Rules of Civil Procedure 4(m) and 41(b). However, unbeknownst to Judge Bowbeer at the time, Dr. Schmolt was not the defendant Clark hoped to sue or serve. Without notifying the Court, Clark substituted Dr. Schmidt for Dr. Schmolt in his service efforts.

Still, Clark was successful in serving Dr. Schmidt within the timeframe set by Judge Bowbeer. Dr. Schmidt dutifully answered Clark's complaint and acknowledged that he was the doctor Clark likely meant when referring to "Dr. Schmolt." Counsel for Dr. Schmidt has made an appearance, notified Judge Bowbeer of the Schmolt – Schmidt confusion, and sought to engage in motion practice. In short, the R&R's recommendation for dismissal of the claims against Dr. Schmolt is moot.

III. ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Objections [Doc. No. 208] are **OVERRULED** as moot.
2. The Court respectfully **DECLINES TO ADOPT** the Report and Recommendation [Doc. No. 194] on the grounds that it is moot.
3. The Clerk of Court is **ORDERED** to change the caption of this case to remove Dr. Schmolt and substitute in Dr. Derek J. Schmidt.

Dated: October 3, 2016

s/ Susan Richard Nelson
SUSAN RICHARD NELSON
 United States District Judge